

2021 ADVANCED DUI TRIAL ADVOCACY

September 20 – September 22, 2021
Phoenix, Arizona



Tuesday, September 21, 2021

Roundtable on Proposition 207 Topics

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LEGAL BULLETIN

#21-0001

May 11, 2021

To: Arizona State Law Enforcement and Prosecutorial Agencies

From: Jared Johnson, GOHS Proposition 207 Prosecutor

Copy: Alberto Gutier - Director Governor's Office of Highway Safety

Re: Arizona House Bill 2171 – Amending Certain Arizona Revised Statutes Related to Marijuana Violations in Support of Proposition 207

BACKGROUND:

On April 14th, 2021, Arizona Governor Ducey signed Arizona House Bill (HB) 2171 into law as an emergency measure making it effective immediately. Last year Arizona voters passed Proposition 207 (Smart and Safe Arizona Act) legalizing recreational marijuana under state law. HB 2171 furthers Proposition 207 by integrating certain provisions of Proposition 207 into the current law and provides for the ability to process cases falling within the act and also authorizes peace officers to detain persons as reasonably necessary to investigate an actual or suspected violation of a civil marijuana offense and to serve a copy of a complaint, if one is issued. The bill does not otherwise in any way alter Proposition 207.

RELEVANT PROVISIONS:

A.R.S. § 8-202

Extends juvenile court jurisdiction to include civil marijuana violations. All civil and criminal marijuana offense involving juveniles should be filed in juvenile court. The county presiding judge may choose to decline jurisdiction of civil marijuana violations as many counties have done for juvenile traffic violations. However, until such a declination has been made, juvenile civil and criminal marijuana offenses cannot be filed in municipal or justice courts.

A.R.S. § 8-323

Allows juvenile hearing officers in municipal and justice courts to hear juvenile civil marijuana cases. As noted above, juvenile civil marijuana citations may only be cited in those courts if the county juvenile court has declined jurisdiction.

A.R.S. § 13-3405, 3408, 3415

Possession of marijuana, marijuana products, and marijuana paraphernalia covered by Proposition 207 are excluded from prosecution under these statutes.

A.R.S. § 22-701

Grants jurisdiction to justice courts and municipal courts to hear civil marijuana violation cases. Hearing officers appointed pursuant to section § 28-1553 may also hear civil marijuana cases. Civil marijuana cases may be initiated by a uniform traffic ticket and complaint (UTT) issued by a peace officer. Civil marijuana cases must be filed within 60 days after the alleged violation and shall be served within ninety days after the filing date. A complaint alleging a civil marijuana violation may be served by delivering a copy of the UTT to the person who is charged with the violation or by any means authorized by the Arizona Rules of Civil Procedure. Non-juvenile minors (18-20) committing a civil marijuana violation should be cited into city court.

Most importantly, officers are specifically given the authority to stop and detain a person as is reasonably necessary to investigate an actual or suspected violation of a civil marijuana offense and to serve a copy of the complaint. Once served, an officer has ten days to file a complaint with the court.

Proposition 207

Responsible Adult Use, Regulation and Taxation of Marijuana

Proposition 207 DUI Related Provisions

Section 1. Short title

This act may be cited as the “Smart and Safe Arizona Act”.

Section 2 Findings and declaration of purpose

(2) In the interest of the health and public safety of our citizenry, the legal adult use of marijuana should be regulated so that:

(g) Driving, flying or boating **while impaired to the slightest degree** by marijuana remains illegal.

A.R.S. 36-2851 this chapter

(3) Does not allow driving, flying or boating **while impaired to even the slightest degree** by marijuana or prevent this state from enacting and imposing penalties for driving, flying, or boating while impaired to even the slightest degree by marijuana.

A.R.S. 36-2852

(B) Notwithstanding any other law, a person with metabolites or components of marijuana in the person’s body is guilty of violating section 28-1381, subsection A, paragraph 3 **only if the person is also impaired to the slightest degree.**

(C) Notwithstanding any other law, the odor of marijuana or burnt marijuana does not by itself constitute reasonable articulable suspicion of a crime. This subsection does not apply when a law enforcement officer is investigating whether a person has violated section 28-1381.

Proposition 207 Traffic Related Provisions

A.R.S. 36-2851 this chapter

(8) Does not allow any person to:

(a) Smoke marijuana in a public place or open space.

(b) Consume marijuana or marijuana products **while driving, operating or riding in the passenger seat or compartment of an operating motor vehicle**, boat, vessel, aircraft or another vehicle used for transportation.

A.R.S. 36-2850

- (3) **Consume** means the act of ingesting, inhaling, or otherwise introducing marijuana into the human body.
- (16) **Marijuana**
 - (a) means all parts of the plant of the genus cannabis, whether growing or not, as well as the seeds from the plant, the resin extracted from any part of the plant, and every compound, manufacture, salt, derivative, mixture or preparation of the plant or its seed or resin.
 - (b) includes cannabis as defined in section 13-3401
 - (c) does not include industrial hemp, the fiber produced from the stalks of the plant of the genus cannabis, oil or cake made from the seeds of the plant, sterilized seeds of the plant that are incapable of germination, or the weight of any other ingredient combined with marijuana to prepare topical or oral administrations, food drink or other products.
- (22) **Open Space** means a public park, public sidewalk, public walkway or public pedestrian thoroughfare.
- (24) **Public Place** has the same meaning prescribed in the smoke-free Arizona Act, section 36-601.01.

[9. "Public place" means any enclosed area to which the public is invited or in which the public is permitted, including airports, banks, bars, common areas of apartment buildings, condominiums or other multifamily housing facilities, educational facilities, entertainment facilities or venues, health care facilities, hotel and motel common areas, laundromats, public transportation facilities, reception areas, restaurants, retail food production and marketing establishments, retail service establishments, retail stores, shopping malls, sports facilities, theaters, and waiting rooms. A private residence is not a "public place" unless it is used as a child care, adult day care, or health care facility.]
- (25) **Smoke** means to inhale, exhale, burn, carry or possess any lighted marijuana or lighted marijuana products, whether natural or synthetic

Does Proposition Add an Element to (A)(3) or Create an Affirmative Defense?

It is not clear how the courts will rule.

Affirmative Defense Basic Law

A.R.S. § 13-103(B) states in part: "affirmative defense" means a defense that is offered and that attempts to excuse the criminal actions of the accused or another person for whose actions the accused may be deemed to be accountable."

"A defendant who relies upon an exception to a criminal statute made by a proviso or distinct clause has the burden of establishing and showing that she comes within the exception." "[T]he state is not required to [prove] negative statutory exceptions—such exception is a matter of defense where it is not an ingredient of the offense." *State v. Bayardi (Fannin, RPI)*, 230 Ariz. 195 (App. 2012); *In re Appeal In Maricopa County, Juvenile Action No. JT9065297*, 181 Ariz. 69 (App. 1994); *State v. Jung*, 19 Ariz.App. 257, 262 (1973).

"[A]n affirmative defense is a matter of avoidance of culpability even if the State proves the offense beyond a reasonable doubt. It "does not serve to negative any facts of the crime which the State is to prove in order to convict..." *Patterson v. New York*, 432 U.S. 197, 207 (1977).

Basic summary for A.R.S. § 28-1381(A)(3) marijuana cases:

- An affirmative defense is one "that is offered and that attempts to excuse the criminal actions of the accused."
- The crime is driving while having a drug or metabolite defined in A.R.S. § 13-3401 in one's body.
- The fact that the drug is marijuana excuses this crime for Proposition 207 cases.
- The fact that the drug is marijuana does not negate an element.

The fact that the proposition 207 measures were placed in a separate section/statute supports the argument that is an affirmative defense. *See, Fannin, supra.; State v. Berryman* 178 Ariz. 617, 621-622, (App. 1994).

- It appears it may be an exception for marijuana - if the drug is defined in 13-3401 the person is guilty, unless the drug is marijuana.
- A person with marijuana in the system is guilty of (A)(3) unless he is not impaired
- Unless or except provisions are affirmative defenses. *See, State v. Kelly*, 210 Ariz. 460, 462-463, (App. 2005).

Lesser Included Offense Basic Law

If it is an element, one needs to determine whether the (A)(1) impairment offense is now a lesser included offense of (A)(3) for marijuana DUI offenses. This would not apply to other DUI drug offenses.

A lesser-included offense is an offense composed of some, but not all, of the elements of the greater crime. It must be impossible to commit the greater offense without committing the lesser offense. *State v. Foster*, 191 Ariz. 355 (1998); *State v. Woods*, 168 Ariz. 543 (1991) (emphasis added). If an offense cannot be committed without necessarily committing the lesser offense, then the lesser offense is a lesser-included offense. *State v. Seats*, 131 Ariz. 89, 638 P.2d 1335 (1981); *Brown v. Ohio*, 432 U.S. 161 (1977).

Both statutes require driving/APC while impaired to the slightest degree. The “under the influence” language contained in (A)(1) is not in (A)(3) or 36-2852(B). However case law has consistently defined “Under the Influence” to mean Impaired/Intoxicated “to the Slightest Degree.” *Hasten v. State*, 35 Ariz. 427 (1929); *Franklwin v. Clementt*, 240 Ariz. 587 (App. 2016); *State v. Parker*, 136 Ariz. 474 (App. 1983). Also, we do not want “under the influence” to be different or more than impaired to the slightest degree. If it is, then we have an additional element and it will be a bit more difficult to prove every (A)(1) DUI.

Post 11/30/2020 Marijuana DUI's Will Be All About Impairment

Whether it is an element or an affirmative defense, § 28-1381(A)(3) marijuana cases with DOVs 11/30/2020 or after, will be all about impairment. So, remember if you have defendants who plead guilty to marijuana (A)(3) charges, be sure to include impairment in the factual basis.